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17 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1907; NUMBER

IN THE MATTER
of
ALBERT N. MOORE, an Infant,
by next friend, Petitioner.

PETITION FOR WRIT OF MANDAMUS

THOMAS T. FAUNTLEROY
SHEPARD BARCLAY
Attorneys and of Counsel for Petitioner

(No.)

ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1907

IN THE MATTER
of
ALBERT N. MOORE, an Infant,
by next friend, Petitioner.

PETITION FOR WRIT OF MANDAMUS

To the Honorable, the Chief Justice and the Justices of the United States Supreme Court:

The petition of Albert Newton Moore, by next friend, to the Honorable, the Supreme Court of the United States, respectfully showeth:

That your petitioner, Albert Newton Moore, **is now** and has been for several years last past **a citizen and resident of the State of Illinois,** and that he is now (and was at all the dates hereinafter named) **an infant under the age of twenty-one years,** and being such infant, George Safford was duly appointed as next friend

of your petitioner by the Circuit Court of the City of St. Louis, Missouri, in accordance with the laws of Missouri in such case made and provided; and thereupon your petitioner as plaintiff began an action at law, November 16th, 1906, by his said next friend, against The Louisville & Nashville Railroad Company, as defendant, in one of the said courts of the State of Missouri, namely, The Circuit Court in the City of St. Louis, which said action was for serious personal injuries sustained by your petitioner in the City of Mt. Vernon, State of Illinois, as will appear by a copy of said petition as filed in said Circuit Court, City of St. Louis, Missouri, which will be submitted herewith to your Honors, as part of the complete transcript of the record of proceedings in said cause.

Upon the filing of said petition a writ of summons (directed to said defendant in the usual way) out of said Circuit Court, City of St. Louis, was issued, and duly served, November 17, 1906, upon the defendant, The Louisville & Nashville Railroad Company, by delivering a copy of the writ and petition as furnished by the clerk to John Fitzgerald, superintendent of said defendant corporation, he being in said defendant's usual business office and in charge thereof; the president or other chief officer of said defendant could not be found in the City of St. Louis at the time of service, according to the return of the sheriff of said city upon said writ of summons, duly made in accordance with the law of Missouri; and whereby said State Circuit Court acquired personal jurisdiction over said defendant corporation which then was, and had long been, at the time said action was begun, a corporation incorporated under the laws of the State of Kentucky and a citizen and resident of said latter State.

Your petitioner further avers that, at the return (December) term of said Circuit Court, City of St. Louis, 1906, the defendant, said Railroad Company, filed in said action in said State Court, **a petition for removal thereof** to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, a copy of which petition appears in full as part of the duly certified transcript of proceedings in said cause (submitted herewith to your Honors) whereby it appears, in accordance with the facts, that your petitioner then and at the time when the petition in said action was filed, was **a citizen and resident of the State of Illinois,** and that said defendant, said railroad company, then, and at the time when said action was commenced, was a corporation organized and existing under the laws of the **State of Kentucky, and a citizen and resident of said State;** and that **neither plaintiff nor defendant was then,** or at the time when said action was commenced, **a citizen or resident of the State of Missouri.**

It appeared, furthermore, affirmatively, from said petition for removal, that no federal question or cause of action arising under the Constitution or laws of the United States was claimed to be involved in said action, and that the sole ground upon which the said removal of said cause to the United States Circuit Court was claimed by defendant, was on the supposed, but (as your petitioner is advised and believes) mistaken and erroneous grouud of the citizenship of the parties as above stated.

Whereupon said State Circuit Court in the City of St. Louis, at the December Term, 1906, on December 5th, 1906, approved the bond offered by said defendant

to said Court at the time when said petition for removal was presented, and entered an order that the Clerk of said State Circuit Court certify a transcript of the proceedings in said cause, forthwith, to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, which was accordingly done, and a duly certified transcript of said proceedings was filed in the office of the Clerk of said Circuit Court of the United States, January 31st, 1907.

Your petitioner further avers that, March 22, 1907, an amended petition was filed in his behalf in said cause in the United States Circuit Court aforesaid, and on the 26th day of October, 1907, your petitioner filed **a motion to remand** said cause to the State Circuit Court in the City of St. Louis, on the ground that said United States Circuit Court was **"without jurisdiction to hear and determine the case"**. Said motion to remand was overruled by the Court, November 2, 1907, and exception to said ruling duly taken and allowed at the time; and a **motion to reconsider said ruling** was filed by your petitioner, November 19, 1907, which motion was substantially as follows:

(Omitting caption and signature)

"Comes now the plaintiff, etc., * * * and asks the Court to reconsider its ruling on plaintiff's motion to remand for the reason that the Court erred in refusing to remand said cause from the federal court to the State court and in holding that the plaintiff had waived his objections to the jurisdiction of the federal court and had entered a general appearance in said federal court, **since the plaintiff, being an infant, could not waive any question of jurisdiction either by himself or by his next friend,** and plaintiff asks the Court to consider plaintiff's brief on the subject of waiver by an infant and his next friend herewith filed."

This last described motion was likewise overruled by said Circuit Court of the United States, and exception duly taken and allowed thereto at the time; and said exceptions were duly preserved and recorded by a bill of exceptions in said cause, duly allowed, signed, sealed and made part of the record therein, by the Honorable Judge then and there presiding in said Circuit Court of the United States, which bill was duly filed therein in said court at the same September Term, 1907, thereof, November 19th, 1907, as your petitioner is informed and verily believes.

The premises considered, your petitioner avers that he is advised that said Circuit Court of the United States is without jurisdiction to proceed in said cause, or to entertain and adjudicate the cause of action of your petitioner as presented by the pending petition therein, which states a cause of action which said Circuit Court has no power or jurisdiction to adjudicate between the parties to said action, as your petitioner is advised and verily believes.

Your petitioner is advised and charges the fact to be that there is **no adequate remedy available** to correct the wrong and injury sustained by the action of said Circuit Court of the United States, in taking and continuing to exercise jurisdiction over said cause, and that your petitioner will be otherwise remediless in the premises to obtain speedy and appropriate relief, save as herein prayed.

Wherefore, may it please your Honors to issue out of this Honorable Court a writ of mandamus to the said Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, commanding said Court to remand said cause

of Albert N. Moore, plaintiff, v. The Louisville & Nashville Railroad Company, defendant (No. 5406), to the State court whence it came, and that such further orders to that end may be made as may be conformable with justice and the practice of your Honorable Court in the premises.

And your petitioner will ever pray, etc.

ALBERT NEWTON MOORE,
by GEORGE SAFFORD,
his next friend and
THOMAS T. FAUNTLEROY,
SHEPARD BARCLAY,
Of Counsel for Petitioner.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1907

In the matter of
of
Albert N. Moore,
an infant, by next
friend, *Petitioner.*

State of Missouri, } ss:
City of St. Louis. }

GEORGE SAFFORD, of lawful age, being first duly sworn, says on his oath that he is the next friend and attorney of Albert N. Moore, an infant, the aforesaid petitioner, and on behalf of said petitioner, affiant makes this affidavit, deposes and says that he has read said petition for a writ of *mandamus* and knows the contents thereof; that the matters of fact therein stated are true; and that the matters therein stated upon information and belief, or as matters of opinion, he verily believes to be true; and further affiant sayeth not.

GEORGE SAFFORD.

Subscribed and sworn to before me, the undersigned, this 23rd day of January, 1908; my commission expires, February 20, 1911.

[OFFICIAL SEAL]

WILLIAM R. GILBERT,
Notary Public within and for the City of St. Louis, Missouri.

NOTICE OF APPLICATION FOR WRIT OF MANDAMUS

IN THE

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER
OF
ALBERT N. MOORE,
By George Safford, his Next Friend,
Petitioner.

To the Honorable, the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri:

This Honorable Court is hereby notified that the undersigned, as attorneys and counsel for the above named petitioner, Albert N. Moore, will, on Monday, January 27th, 1908, at noon of said date, or as soon thereafter as counsel can be heard in that behalf, apply to the Supreme Court of the United States by petition for a writ of mandamus to be directed to the Honorable, the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, to command your Honorable Court to remand an action at law, wherein the record is therein and wherein said petitioner, Albert N. Moore by next friend is plaintiff v. The Louisville & Nashville Railroad Company, defendant, No. 5406; and this notice is to inform your Honorable Court of said application.

THOS. T. FAUNTLEROY and
SHEPARD BARCLAY,
Attorneys and of Counsel for Petitioner, Albert N. Moore.

Eastern Division of the Eastern Judicial District of Missouri, ss:

ST. LOUIS, Mo., January 23, 1908.

The undersigned, as clerk of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, hereby certifies that a paper, of which the foregoing is a copy was filed in said Court by the counsel aforesaid, this 23rd day of January, 1908.

In testimony whereof, witness my hand and the seal of said Court this 23rd day of January, 1908.

SEAL
Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

JAMES R. GRAY,
Clerk of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

TRANSCRIPT OF RECORD

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

BE IT REMEMBERED: that heretofore, to-wit: on the 31st day January, A. D. 1907, there was filed in the office of the Clerk of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, a transcript of proceedings from the Circuit Court, City of St. Louis, wherein Albert Newton Moore, by his next friend, Geo. Safford, is plaintiff, and the Louisville & Nashville Railroad Company is defendant, which said transcript is in words and figures as follows, to-wit:

(TRANSCRIPT.)

State of Missouri, } ss.
City of St. Louis. }

Be it remembered, that heretofore, to-wit: at the October Term, A. D. 1906, of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the 16th day of November, 1906, the following proceeding was had in "The Matter of Albert Newton Moore, a minor", to-wit:

Friday, November 16th, 1906.

Albert Newton Moore,
vs. 539 Dec. T. 1906,
The Louisville & Nashville Railroad Company.

Now comes Albert Newton Moore, an infant over the age of fourteen years, and presents his petition for the

appointment of next friend, and George Safford having filed his written consent to act as such, it is ordered by the Court that he be appointed to act as next friend for said minor Albert Newton Moore.

The said petition and consent, is in words and figures as follows, to-wit:

State of Missouri, } ss.
City of St. Louis. }

In the Circuit Court in and for the City of St. Louis, Missouri, December Term, 1906.

Albert Newton Moore, Plaintiff,

vs.

The Louisville & Nashville Railroad Company, a Corporation, Defendant.

To the Honorable Judge of the Circuit Court of the City of St. Louis, Missouri.

The petition of Albert Newton Moore respectively represents:

That he is an infant over the age of fourteen years and under the age of twenty-one years; that he desires to institute a suit in the Circuit Court of the City of St. Louis, Missouri, against The Louisville & Nashville Railroad Company to recover the sum of twenty thousand dollars damages for personal injuries received by said Albert Newton Moore by reason of the negligence and carelessness of the said Louisville & Nashville Railroad Company in operating a certain locomotive and train of cars in the City of Mt. Vernon, Illinois, on the tenth day of November, 1905; that the said Albert Newton Moore has no legally appointed guardian and

that his father departed this life in August, 1905; that George Safford of St. Louis, has consented to act and does hereby consent to act as next friend to the said Albert Newton Moore in the prosecution of said suit and to pay the costs thereof.

Wherefore the said Albert Newton Moore prays that the said George Safford may be appointed as his next friend for the purpose of instituting said suit.

IN WITNESS WHEREOF we have hereunto set our hands at St. Louis, Missouri, this sixteenth day of November, 1906.

ALBERT NEWTON MOORE,
GEO. SAFFORD.

And afterwards, to-wit, on November 16th, 1906, a petition was filed in the office of the Clerk of said Court, in cause No. 43850, Series A, of the causes in said Court, wherein the said Albert Newton Moore, by next friend aforesaid, is plaintiff and the Louisville and Nashville Railroad Company is defendant.

The said petition is in words and figures as follows, to-wit:

State of Missouri, } ss.
City of St. Louis. }

In the Circuit Court in and for the City of St. Louis, Missouri, December Term, 1906.

Albert Newton Moore, by George Safford, Next Friend, Plaintiff,

vs.

The Louisville & Nashville Railroad Company, a Corporation, Defendant.

Comes now Albert Newton Moore, plaintiff, in the above entitled cause, by George Safford, next friend,

and for his cause of action states that the said George Safford, was on the sixteenth day of November, 1906, duly appointed by the Circuit Court in and for the City of St. Louis, Missouri, to act as next friend of plaintiff in the above entitled cause.

Plaintiff, by his next friend, further states that the defendant, The Louisville & Nashville Railroad Company, is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Kentucky for the purpose of transporting passengers and freight for hire, from point to point in Kentucky, Illinois and Missouri and at all such times was duly authorized to do business as a foreign corporation in the States of Missouri and Illinois and at all such times owned, maintained and controlled an office for the transaction of its business in the City of St. Louis, Missouri.

Plaintiff, by his next friend, further states that on a certain day, to-wit, the tenth day of November, 1905, the defendant negligently and carelessly caused a steam locomotive then and there attached to and drawing a number of freight cars in a westwardly direction in Mt. Vernon, Illinois, to strike and injure plaintiff to his great damage.

Plaintiff, by his next friend, further states that when plaintiff was injured as aforesaid and at all times theretofore Mt. Vernon was a city duly incorporated under the laws of the State of Illinois and duly authorized by the laws of said State to control and regulate by ordinance the speed of locomotives and freight trains within the limits of said city and that when plaintiff was injured and at all times theretofore, the defendant negligently and carelessly caused the locomotive and train

of freight cars thereto attached by which plaintiff was injured as aforesaid, to run at a rate of speed in excess of the rate of six miles per hour and thereby violated the provisions of Ordinance No. 280 of said City of Mt. Vernon, by the provisions of which ordinance the defendant was required to run locomotives and freight trains at a rate of speed not exceeding six miles an hour in said City of Mt. Vernon at said time, and that the defendant when plaintiff was injured as aforesaid and at all times theretofore had received from the City of Mt. Vernon, a true copy of said ordinance and been served therewith by the duly authorized officers of said city and had accepted said ordinance and contracted and agreed with the plaintiff, the said City of Mt. Vernon and the State of Illinois to comply with the provisions thereof.

Plaintiff further states that at the point where plaintiff received the injuries aforesaid and at all points at and near the track on which said locomotive and cars were running when plaintiff was injured as aforesaid within six hundred feet of the place where plaintiff was so injured the employes of the defendant, the employes of a corporation then owning, controlling and operating shops for the manufacture of freight cars and the public generally when plaintiff was injured and at all times of the day and night then continually theretofore for a period of many years frequently habitually and with the knowledge, and acquiescence of the defendant, walked to and fro and that the defendant, when plaintiff was injured as aforesaid and at all times theretofore by the exercise of ordinary care would have known, and did know, that plaintiff, defendant's employes, the employes working in said car shops and the public gen-

erally were likely to be and were walking to and fro at all times of the day and night at or near the place where plaintiff received the injuries aforesaid.

Plaintiff further states that at the time he received the injuries herein set out and at all times prior thereto, the defendant negligently and carelessly caused and permitted said locomotive and freight cars to run at a rate of speed unsafe and dangerous to plaintiff and persons near plaintiff who were likely to be and who were moving toward, dangerously near, at and upon the track upon which said locomotive and cars were running as aforesaid and that the defendant at all such times, by its servants and agents then and theretofore in charge of and controlling the motion of said locomotive and cars, negligently and carelessly failed to keep a vigilant watch ahead of said locomotive for plaintiff and persons who were likely to be and persons who were moving toward, dangerously near, at and upon said track and upon the first appearance of danger negligently and carelessly failed to stop said locomotive and cars in the shortest time it could by the exercise of ordinary care and that at all such times the said defendant, negligently and carelessly failed to either ring the bell on said locomotive or blow the whistle on said locomotive or give any warning to any one and thereby negligently and carelessly failed to warn plaintiff of the approach of said locomotive and the consequent danger and that the defendant by the exercise of ordinary care would have known, and did know, in time to have prevented the plaintiff from receiving said injuries by the exercise of ordinary care, that plaintiff and other persons then and theretofore were likely to be and were moving toward, dangerously

near, at and upon said track, at and near the place where plaintiff was injured as aforesaid and in danger of being injured by said locomotive.

Plaintiff further states that although the defendant at all times prior to the day on which plaintiff was injured as aforesaid notified all persons within hearing distance of an electric bell then and theretofore maintained by by defendant on a stationary post near and within hearing distance of the point at which plaihtiff received said injuries by ringing said bell when cars and locomotives were moving within hearing distance thereof and by not ringing said bell when cars and locomotives were not moving within hearing distance thereof whether or not locomotives and cars were moving at or near the point where plaintiff was injured as aforesaid, which method of notification was always recognized and relied upon by the plaintiff, the defendant, its employes and the general public as a proper notification and assurance on the part of the defendant to all persons within hearing distance of said bell of the conditlon of said premises with reference to danger from moving cars, the defendant, as the locomotive by which plaintiff was injured as aforesaid approached and injured plaintiff and for some time prior thereto negligently and carelessly failed to ring said bell on said stationary post and warn the persons within hearing distance of said bell and especially the plaintiff that said locomotive was approaching and the consequent danger and thereby negligently and carelessly assured plaintiff that it was safe for him to approach and to walk near upon along and over said track at and near the point where he was injured as aforesaid.

Plaintiff, by his said next friend, further states that

by reason of the negligence and carelessness aforesaid, and as a direct result thereof the bones, muscles, tendons, ligaments, veins, arteries, nerves, membranes and tissues of plaintiff's head, right foot, right leg, right thigh, right hip, left arm, left shoulder, and back were greatly cut, lacerated, torn, bruised, crushed, twisted, strained, bent, broken and infected, plaintiff's memory, sense of sight, sense of hearing, mental power, muscular power and power and ability to earn an income and wages seriously and permanently impaired, plaintiff's right leg and thigh greatly and permanently shortened and plaintiff caused to suffer great bodily pain and mental anguish and be a hopeless cripple and incur liability for and expend a large sum of money for medical and surgical attention and services in trying to cure said injuries, to-wit: The sum of one hundred dollars and that plaintiff during his life will always remain a cripple as aforesaid and suffer great and permanent bodily pain and mental anguish and to be compelled to expend in and about the medical and surgical treatment of said injuries a large sum to plaintiff at present unknown.

Plaintiff by his next friend, further states that by reason of the facts aforesaid and as a direct result thereof he has been damaged, in the sum of twenty thousand dollars for which with the costs of this suit he prays judgment.

GEO. SAFFORD,
Next Friend and Attorney for Plaintiff.

Upon the filing of the said petition, a writ of summons for the defendant, was issued by the Clerk of said Court, to the Sheriff of the City of St. Louis; which said writ, together with the return of said sheriff

therein endorsed, are respectively in words and figures as follows, to-wit:

State of Missouri, } ss.
City of St. Louis. }

The State of Missouri: To the Sheriff of the City of St. Louis—Greeting:

We command you to summon The Louisville & Nashville Railroad Company, a corporation, to appear before the Judges of our said *Court* Court, on the first day of the next term thereof, to be held in the City of St. Louis, at the court house in said city, on the first Monday of December next, then and there to answer the complaint of Albert Newton Moore, by George Safford, next friend, as set forth in the annexed petition; and have you then and there this writ:

WITNESS, WILLIAM H. HAUSCHULTE, Clerk of our said Court, with the seal thereof hereto affixed, at office in the City of St. Louis, this 17th day
[SEAL] November, in the year of our Lord nineteen hundred and six.

WM. H. HAUSCHULTE, *Clerk.*

Served this writ in the City of St. Louis, Missouri, on the within named defendant the Louisville & Nashville Railroad Company (a corporation), this 17th day of November, 1906, by delivering a copy of the writ and petition as furnished by the clerk to John Fitzgerald, Supt. of the said defendant corporation, he being in said defendant's usual business office and in charge thereof. The president or other chief officer of said defendant could not be found in the City of St. Louis at the time of service.

PATRICK H. CLARKE, *Sheriff.*
By R. J. BURNS, *Deputy.*

Fee $1.00.

And at the December Term, 1906, of said court, and on the third day thereof, the following proceedings were had in said cause, to-wit:

Wednesday, December 5th, 1906.

Albert Newton Moore by George Safford, Next Friend,

vs. 43859

The Louisville and Nashville Railroad Company.

Now at this day comes the defendant by attorney, and files a petition, praying for the removal of this cause to the Circuit Court of the United States, and also files herein its bond conditioned according to law, in the sum of five hundred dollars. And the Court having heard and duly considered the said petition, doth approve said bond, and doth order that the clerk of this court forthwith certify to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri a transcript of the record and proceedings in this cause as fully as the same remain on file and of record in this court.

The said petition and bond for removal are, respectively, in words and figures as follows, to-wit:

State of Missouri, } ss.
City of St. Louis. }

In the Circuit Court in and for the City of St. Louis, Missouri. December Term, 1906.

Albert Newton Moore by George Safford, Next Friend, Plaintiff,

vs.

The Louisville and Nashville Railroad Company, a Corporation, Defendant.

PETITION FOR REMOVAL.

Your petitioner, the Louisville and Nashville Railroad Company, defendant in the above entitled cause, respectfully shows that the matter and amounts in dispute in this cause, exclusive of interest and costs, exceeds the sum of two thousand dollars.

Your petitioner further shows that this action is wholly between citizens of different States; that the plaintiff, Albert Newton Moore, is a citizen and resident of the State of Illinois, and was such at the time of the commencement of this action, and ever since, and is now, such citizen and resident of the State of Illinois; that George Safford, next friend of said Albert Newton Moore, is a citizen and resident of the State of Missouri, and was such at the time of the commencement of this action, and ever since has been, and is now, such citizen of the State of Missouri; that the Louisville and Nashville Railroad Company, the defendant and your petitioner herein, was, at the time of the institution of this suit, and has been ever since that time, and is now, a corporation organized, created and existing under the laws of the State of Kentucky, and is a citizen and resi-

dent of the State of Kentucky, and was such at the time of the institution of this suit, and has been ever since said time, and is now, such citizen and resident of the State of Kentucky; that the Louisville and Nashville Railroad Company, defendant herein, was not, at the time of the filing of this suit, or since said time, nor is it now, a citizen or resident of the State of Missouri, or of any other State than the State of Kentucky.

Your petitioner further shows that this action is of a civil nature at common law, and has been brought, and is now pending in this Honorable court, and has not yet been tried, nor has the time at or before which the defendant, your petitioner, is required by the law of the State of Missouri, or by any rule or rules of this Honorable Court, to answer or plead to the petition of the plaintiff, elapsed, and your petitioner has not yet filed any pleading or in any way appeared in this action.

The general object and nature of this suit is as follows, namely:

Plaintiff seeks to recover from defendant, your petitioner, damages in the sum of twenty thousand dollars, because of alleged wrongful acts of this defendant, its agents and servants, in negligently and carelessly causing, as is alleged in plaintiff's petition a steam locomotive attached to and drawing a number of cars in Mt. Vernon, Illinois, to strike and injure plaintiff, to his damage.

Your petitioner desires to remove this suit before trial thereof, to the next Circuit Court of the United States to be held in the Eastern Division of the Eastern District of Missouri, and your petitioner herewith offers good and sufficient surety and bond for your petitioner entering in said Circuit Court of the United States, on the

the first day of the next session thereof, a copy of the record in this suit, and for paying all costs that they may be awarded by said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully and improperly removed thereto.

Wherefore, your petitioner prays this Court that said surety and bond may be accepted, and that this Honorable Court will make an order removing this cause to the next Circuit Court of the United States to be held in the Eastern Division of the Eastern District of Missouri, pursuant to the statutes of the United States in such cases made and provided; and your petitioner further prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept said surety and bond, and to cause the record herein to be removed to said Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri, and it will ever pray.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
By BRYAN & CHRISTIE,
Attorneys for Petitioner in the above entitled cause.

State of Missouri, } ss.
City of St. Louis. }

P. Taylor Bryan, being duly sworn on his oath, says he is one of the attorneys for the defendant in the above entitled cause, and of the petitioner named in the foregoing petition; that he has read the said petition and believes the same to be true, and that said petitioner is absent from, and is a non-resident of, the City of St. Louis, State of Missouri, in which said suit is brought, and that affiant makes this affidavit in behalf of said

defendant for the reason that said defendant, Louisville and Nashville Railroad Company, is absent from, and non-resident of, the State of Missouri.

P. TAYLOR BRYAN.

Subscribed and sworn to before me, a notary public within and for said City and State, duly qualified and commissioned for a term expiring on the 5th day of December, 1906.

My term expires February 14th, 1907.

[SEAL] HAROLD R. SMALL,
Notary Public, in and for the City of St. Louis, Mo.

State of Missouri, } ss.
City of St. Charles. }

In the Circuit Court in and for the City of St. Louis, Missouri, December Term, 1906.

Albert Newton Moore, by George Safford, Next Friend, Plaintiff,

vs.

The Louisville & Nashville Railroad Company, a Corporation, Defendant.

BOND FOR REMOVAL.

Know all men by these presents that we, the Louisville & Nashville Railroad Company, a corporation organized and existing under the laws of the State of Kentucky as principal, and the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, as surety, are held and firmly *bond* unto Albert Newton

Moore in the penal sum of five hundred dollars for the payment of which well and truly to be made unto the said Albert Newton Moore, his heirs, representatives and assigns, we bind ourselves, our representatives and successors, jointly and firmly by these presents.

Upon condition, nevertheless, that whereas the said Louisville & Nashville Railroad Company has filed its petition in the Circuit Court of the City of St. Louis, State of Missouri, for the removal of a certain cause therein pending, wherein said Albert Newton Moore is plaintiff, and the said Louisville & Nashville Railroad Company is defendant, to the Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri.

Now, if the said Louisville and Nashville Railroad Company shall enter into the said Circuit Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof, we, the said Louisville & Nashville Railroad Company and the said United States Fidelity and Guaranty Company have hereunto caused our names to be signed, and this instrument to be sealed, this fifth day of December, 1906.

Louisville & Nashville Railroad Company, [seal]
By Bryan & Christie, [seal]
Its Attorneys in Fact and at Law.
United States Fidelity & Guaranty Company,
By Noel L. Robyn, [seal]
Attorney in Fact.

Approved in open court this
5th day of December, 1906.

WM. H. HAUSCHULTE,
Clerk.

State of Missouri, }
City of St. Louis. } ss.

I, Fred H. Kreismann, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, do hereby certify the above and foregoing to be a full, true and complete transcript of the record and proceedings in the above entitled cause, including the petition, affidavit and bond for removal and the order of removal, as fully as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court, at office in [SEAL] the City of St. Louis, this the 28th day of January, 1907.

FRED H. KREISMANN,
Clerk, Circuit Court.

And afterwards, to-wit, on the 22nd day of March, A. D. 1907, there was filed in said cause an amended petition, which said amended petition is in words and figures as follows, to-wit:

(AMENDED PETITION)

State of Missouri, } ss.
City of St. Louis. }

In the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri, March Term, 1907.

Albert Newton Moore,
by George Safford, Next Friend.
Plaintiff,

vs.

The Louisville & Nashville Railroad Company, a Corporation,
Defendant.

Comes now Albert Newton Moore, plaintiff in the above entitled cause, by George Safford, next friend, and for his cause of action states that the said George Safford, was on the sixteenth day of November, 1906, duly appointed by the Circuit Court in and for the City of St. Louis, Missouri, to act as next friend of plaintiff in the above entitled cause.

Plaintiff, by his said next friend, further states that the defendant, The Louisville & Nashville Railroad Company, is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Kentucky for the purpose of transporting passengers and freight, for hire, from point to point in Kentucky, Illinois and Missouri and at all such times was duly authorized to do business as a foreign corporation in the State of Missouri and Illinois and at all such times owned, maintained and controlled an office for the transaction of its business in the City of St. Louis, Missouri.

Plaintiff, by his next friend, further states that on a certain day, to-wit: the tenth day of November, 1905, the defendant negligently and carelessly caused a steam locomotive then and there attached to and drawing a number of freight cars in a westwardly direction in Mt. Vernon, Illinois, to strike and injure plaintiff to his great damage.

Plaintiff, by his next friend, further states that when plaintiff was injured as aforesaid and at all times theretofore Mt. Vernon was a city duly incorporated under the laws of the State of Illinois and duly authorized by the laws of said State to control and regulate by ordinance the speed of locomotives and freight trains within the limits of said city and that when plaintiff was injured and at all times theretofore the defendant negligently and carelessly caused the locomotive and train of freight cars thereto attached by which plaintiff was injured as aforesaid to run at a rate of speed in excess of the rate of six miles per hour and thereby violated the provisions of Ordinance #280 of said City of Mt. Vernon, by the provisions of which ordinance the defendant was required to run locomotives and freight trains at a rate of speed not exceeding six miles an hour in said city of Mt. Vernon at said time, and that the defendant when plaintiff was injured as aforesaid and at all times theretofore had received from the City of Mt. Vernon, a true copy of said ordinance and been served therewith by the duly authorized officers of said city and had accepted said ordinance and contracted and agreed with the plaintiff, the said City of Mt. Vernon and the State of Illinois to comply with the provisions thereof.

Plaintiff further states that at the point where plaintiff received the injuries aforesaid and at all points at

and near the track on which said locomotive and cars were running when plaintiff was injured as aforesaid within six hundred feet of the place where plaintiff was so injured the employes of the defendant, the employes of a corporation then owning, controlling and operating shops for the manufacture of freight cars and the public generally when plaintiff was injured, and at all times of the day and night then and continually theretofore for a period of many years frequently, habitually and with the knowledge and acquiescence of the defendant, walked to and fro, and that the defendant, when plaintiff was injured as aforesaid and at all times theretofore by the exercise of ordinary care would have known, and did know, that plaintiff, defendant's employes, the employes working in said car shops and the public generally, were likely to be and were walking to and fro at all times of the day and night at and near the place where plaintiff received the injuries aforesaid.

Plaintiff, by said next friend further states that at the time the plaintiff received the injuries herein set out the defendant, by its officers, by its General Superintendent and by the person who employed and discharged and has general supervision over the engineers employed by the defendant and especially over the engineer in charge of, operating and controlling the motion of the locomotive by which plaintiff was injured and who caused said locomotive to injure plaintiff as aforesaid knew at all times before plaintiff received the injuries herein set out that said engineer in charge of the locomotive that injured plaintiff as aforesaid continually and habitually operated said locomotive and other locomotives in the City of Mount Vernon at a rate of speed unsafe and dangerous to persons on and near the track

on which said locomotive was being operated and at a rate of speed in excess of the rate of six miles per hour and violation of the provisions of said ordinance.

Plaintiff by his next friend further states that the defendant before plaintiff received the injuries herein set out negligently and carelessly failed to notify the engineer who caused said locomotive to injure plaintiff as aforesaid of the provisions and requirements of said ordinance or of the provisions and requirements of said statute which said negligence on the part of the defendant contributed with the other negligence of defendant herein complained of to cause the injuries to plaintiff herein set out.

Plaintiff, by his next friend, further states that at the time plaintiff was injured as aforesaid and at all times prior thereto there was in force in the State of Illinois a statute duly enacted by the proper authorities in said State a true copy of said statute being as follows:

"93. SPEED THROUGH CITIES—DAMAGES—CUMU-
"LATIVE PENALTIES. Art. 24. Whenever any
"railroad corporation shall by itself or agents, run
"any train, locomotive engine, or car at a greater
"rate of speed in or through the incorporated
"limits of any city, town or village, than is per-
"mitted by any ordinance of such city, town or
"village, such corporation shall be liable to the
"person aggrieved for all damages done to the
"person or property by such train, locomotive
"engine or car; and the same shall be presumed
"to have been done by the negligence of said corpo-
"ration, or their agents; and in addition to such
"penalties as may be provided by such city, town
"or village, the person aggrieved by the violation
"of any of the provisions of this section, shall
"have an action against such corporation, so viola-
"lating any of the provisions to recover a penalty

"of not less than one hundred dollars nor more
"than two hundred dollars ($200) to be recovered
"in any court of competent jurisdiction; said action
"to be an action of debt, in the name of the people
"of the State of Illinois for the use of the person
"aggrieved; but the court or jury trying the case
"may reduce said penalty to any sum, not less
"however than fifty dollars ($50), where the
"offense committed by such violation may appear
"not to be malicious or willful; provided, that no
"such ordinance shall limit the rate of speed, in
"case of passenger trains to less than ten miles
"per hour, nor in any other case to less than six
"miles per hour."

Plaintiff further states that at the time he received the injuries herein set out and at all times prior thereto, the defendant negligently and carelessly caused and permitted said locomotive and freight cars to run at a rate of speed unsafe and dangerous to plaintiff and persons near plaintiff who were likely to be and who were moving toward, dangerously near, at and upon the track upon which said locomotive and cars were running as aforesaid and that the defendant at all such times, by its servants and agents then and theretofore in charge of and controlling the motion of said locomotive and cars, negligently and carelessly failed to keep a vigilant watch ahead of said locomotive for plaintiff and persons who were likely to be and persons who were moving toward, dangerously near, at and upon said track and upon the first appearance of danger negligently and carelessly failed to stop said locomotive and cars in the shortest time it could by the exercise of ordinary care and that at all such times the said defendant, negligently and careless[illegible] failed to either ring the bell on said locomotive or blow the whistle on said

locomotive or give any warning to any one and thereby negligently and carelessly failed to warn plaintiff of the approach of said locomotive and the consequent danger and that the defendant by the exercise of ordinary care would have known, and did know, in time to have prevented the plaintiff from receiving said injuries by the exercise of ordinary care, that plaintiff and other persons then and theretofore were likely to be and were moving toward, dangerously near, at and upon said track, at and near the place where plaintiff was injured as aforesaid and in danger of being injured by said locomotive.

Plaintiff further states that although the defendant at all times prior to the day on which plaintiff was injured as aforesaid notified all persons within hearing distance of an electric bell then and theretofore maintained by defendant on a stationary post near and within hearing distance of the point at which plaintiff received said injuries by ringing said bell when cars and locomotives were moving within hearing distance thereof and by not ringing said bell when cars and locomotives were not moving within hearing distance thereof whether or not locomotives and cars were moving at or near the point where plaintiff was injured as aforesaid, which method of notification was always recognized and relied upon by the plaintiff, the defendant, its employes and the general public as a proper notification and assurance on the part of the defendant to all persons within hearing distance of said bell of the condition of said premises with reference to danger from moving cars, the defendant, as the locomotive by which plaintiff was injured as aforesaid approached and injured plaintiff and for some time prior thereto

negligently and carelessly failed to ring said bell on said stationary post and warn the persons within hearing distance of said bell, and especially the plaintiff, that said locomotive was approaching and the consequent danger, and thereby negligently and carelessly assured plaintiff that it was safe for him to approach and to walk near upon along and over said track at and near the point where he was injured as aforesaid.

Plaintiff, by his said next friend, further states that by reason of the negligence and carelessness aforesaid and as a direct result thereof, the bones, muscles, tendons, ligaments, veins, arteries, nerves, membranes and tissues of plaintiff's head, right foot, right leg, right thigh, right hip, left arm, left shoulder and back were greatly cut, lacerated, torn, bruised, crushed, twisted, strained, bent, broken and infected, plaintiff's memory, sense of sight, sense of hearing, mental power, muscular power and power and ability to earn an income and wages seriously and permanently impaired, plaintiff's right leg and thigh greatly and permanently shortened and plaintiff caused to suffer great bodily pain and mental anguish and be a hopeless cripple and incur liability for and expend a large sum of money for medical and surgical attention and service in trying to cure said injuries, to-wit: the sum of one hundred dollars, and that plaintiff during his life will always remain a cripple as aforesaid, and suffer great and permanent bodily pain and mental anguish and to be compelled to expend in and about the medical and surgical treatment of said injuries a large sum, to plaintiff at present unknown.

Plaintiff, by his next friend, further states that by reason of the facts aforesaid, and as a direct result

thereof, he has been damaged, in the sum of twenty thousand dollars, for which, with the costs of this suit, he prays judgment.

GEO. SAFFORD,
Next Friend and Attorney for Plaintiff.

And afterwards, to-wit: on the 25th day of March, A. D. 1907, there was filed in said cause a stipulation allowing defendant to March 30th to plead, which is in words and figures as follows, to-wit:

(STIPULATION ALLOWING DEFENDANT TIME TO PLEAD)

State of Missouri, } ss.
City of St. Louis. }

In the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri, March Term, 1907.

Albert Newton Moore, by George Safford, Next Friend, Plaintiff,

vs.

The Louisville & Nashville Railroad Company, a Corporation, Defendant.

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the defendant may plead to plaintiff's amended petition at any time on or before the thirtieth day of March, 1907.

GEO. SAFFORD,
Attorney for Plaintiff.

BRYAN & CHRISTIE,
Attorneys for Defendant.

And afterwards, to-wit: on the 30th day of March, A. D. 1907, there were filed in said cause motions to strike out amended petition and to make same more definite and certain, which are respectively in words and figures as follows, to-wit:

(MOTION TO STRIKE OUT AMENDED PETITION)

In the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri, March Term, 1907.

Albert Newton Moore, by George Safford, Next Friend,
Plaintiff,
vs.
Louisville & Nashville Railroad Company,
Defendant.

MOTION TO STRIKE OUT PLAINTIFF'S AMENDED PETITION

Now comes defendant Louisville and Nashville Railroad Company and moves the Court to strike out plaintiff's amended petition herein on the following grounds:

First. Because several causes or grounds of action are improperly united therein.

Second. Because common law and statutory causes of action are improperly united in a single count, which count constitutes said petition.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By BRYAN & CHRISTIE,
Attorneys.

(MOTION TO MAKE PETITION MORE DEFINITE AND CERTAIN)

In the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri, March Term, 1907.

Albert Newton Moore, by George Safford, Next Friend,
Plaintiff,
vs.
Louisville & Nashville Railroad Company,
Defendant.

MOTION TO MAKE MORE DEFINITE AND CERTAIN

Now comes the Louisville & Nashville Railroad Company and shows to the Court that the amended petition of the plaintiff is indefinite and uncertain in this, to-wit:

Said petition consists of one count and in said count attempts to unite several causes or grounds of action, some of which are common law and some statutory but has so intermingled the allegations appropriate to each of said causes of action as to make it indefinite and uncertain as to which causes of action allegations in said petition apply. By reason whereof the defendant is unable to make satisfactory answer to said petition.

WHEREFORE defendant moves the Court to rule plaintiff to make his amended petition more definite and certain in the respect above pointed out.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By BRYAN & CHRISTIE,
Attorneys.

And afterwards, to-wit, on the 20th day of May, A. D. 1907, there was filed in said cause a stipulation for continuance, which is in words and figures, as follows, to-wit:

(STIPULATION FOR CONTINUANCE)

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Albert Newton Moore by George Safford, Next Friend, Plaintiff,

vs

The Louisville & Nashville Railroad Company, a Corporation, Defendant.

(STIPULATION FOR CONTINUANCE)

It is hereby stipulated and agreed by and between the above named parties, that the above cause, set for trial, in the above named court, on May twentieth, 1907, be continued.

St. Louis, Mo., March 11, 1907.

GEO. SAFFORD,
Attorney for Plaintiff.
BRYAN & CHRISTIE and
H. R. SMALL,
Attorneys for Defendant.

And afterward, to-wit: on the 28th day of October, A. D. 1907, there was filed in said cause a stipulation for continuance, which is in words and figures as follows, to-wit:

(STIPULATION FOR CONTINUANCE)

Mr. Gray:

Will you please have #5406 Moore v. L. & N. Ry. Co. set for today, Oct. 8, 07, continued by consent.

BRYAN & CHRISTIE and
H. R. SMALL,
Attorneys for Defendant,
GEO. SAFFORD,
Attorney for Plaintiff.

And afterwards, to-wit: on the 26th day of October, A. D. 1907, there was filed in said cause a motion to remand, which said motion to remand is in words and figures as follows, to-wit:

(MOTION TO REMAND)

State of Missouri, } ss.
City of St. Louis. }

In the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, September Term, 1907.

Albert Newton Moore by George Safford, Next Friend, Plaintiff,

vs.

Louisville & Nashville Railroad Company, Defendant.

Comes now the plaintiff, Albert Newton Moore, by George Safford, next friend, and moves this Court to remand the above entitled cause to the Circuit Court in and for the City of St. Louis, Missouri, on the ground that this court is without jurisdiction to hear and determine the case.

GEORGE SAFFORD,
Attorney and Next Friend of Plaintiff.

And afterwards, to-wit: on the 2nd day of November, A. D. 1907, the following among other proceedings were had and appear of record in said cause, to-wit:

(MOTION TO REMAND SUBMITTED)

Albert N. Moore, by Next Friend, etc., Plaintiff.
5406 vs.
Louisville & Nashville Railroad Company, Defendant.

The motion to remand as heretofore filed by said plaintiff is this day submitted to the Court by counsel for the respective parties upon briefs to be furnished.

And afterwards, to-wit: on the 12th day of November, A. D. 1907, the following among other proceedings were had and appear of record in said cause, to-wit:

(MOTION TO REMAND OVERRULED)

Albert Newton, by Next Friend, etc. Plaintiff,
5406 vs.
Louisville & Nashville Railroad Company, Defendant.

The Court having fully considered the motion heretofore filed by said plaintiff to remand this cause doth order that said motion be and the same is hereby overruled. Memorandum of opinion filed.

And afterwards, to-wit: on the 19th day of November, A. D. 1907, there was filed in said cause a motion to reconsider ruling on motion to remand, which said motion is in words and figures as follows, to-wit:

(MOTION TO RECONSIDER RULING ON MOTION TO REMAND)

In the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, November, Term, 1907.

Albert Newton Moore by George Safford, Fext Friend, Plaintiff,

vs.

Louisville & Nashville Railroad Company, Defendant.

Comes now the plaintiff in the above named cause, Albert Newton Moore, by his next friend, George Safford, and asks the Court to reconsider its ruling on plaintiff's motion to remand for the reason that the Court erred in refusing to remand said cause from the Federal Court to the State Court, and in holding that the plaintiff had waived his objections to the jurisdiction of the Federal Court and had entered a general appearance in said Federal Court, since the plaintiff, being an infant, could not waive any question of jurisdiction either by himself or by his next friend, and plaintiff asks the Court to consider plaintiff's brief on the subject of waiver by an infant and his next friend herewith filed.

GEO. SAFFORD,
Attorney and Next Friend of Plaintiff.

And afterwards to-wit: on the 21st day of November, A. D. 1907, the following among other proceedings were had and appear of record in said cause, to-wit:

(Motion to Reconsider Ruling on Motion to Remand Overruled)

Albert N. Moore, by Next Friend, etc., Plaintiff,

5406 vs.

Louisville & Nashville Railroad Company, Defendant.

The Court having fully considered the motion of said plaintiff for a reconsideration of the ruling on the motion to remand herein, doth order that said motion to reconsider be and the same is hereby overruled.

And afterwards, to-wit, on the 27th day of November, A. D. 1907, the following among other proceedings were had and appear of record in said cause, to-wit:

(Term Bill of Exceptions Allowed and Filed.)

Albert Newton Moore, by Next Friend, Etc., Plaintiff,

5406 vs.

Louisville & Nashville Railroad Company, Defendant.

Now comes said plaintiff by his attorney and presents to the Court his term bill of exceptions in this cause, which is now signed by the Judge and is ordered filed and allowed of record herein.

Which said term bill of exceptions is in words and figures as follows, to-wit:

(TERM BILL OF EXCEPTIONS)

In the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Albert Newton Moore, by Next Friend, Plaintiff,
vs.
Louisville & Nashville Railroad Company, Defendant.
No. 5406 Term Bill of Exceptions.

Eastern Division of the Eastern Judicial District of Missouri, ss.

BE IT REMEMBERED that in the progress of this cause, the following proceedings were had at the September Term of said court, to-wit:

On the 26th day of October, 1907, plaintiff filed a motion to remand, as follows:

"State of Missouri, } ss.
City of St. Louis. }

In the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, September Term, 1907.

Albert Newton Moore by George Safford, Next Friend, Plaintiff,
vs.
Louisville & Nashville Railroad Company, Defendant.

Comes now the plaintiff, Albert Newton Moore, by George Safford, next friend, and moves this Court to remand the above entitled cause to the Circuit Court in

and for the City of St. Louis, Missouri, on the ground that this Court is without jurisdiction to hear and determine the case.

GEO. SAFFORD,
Attorney and Next Friend of Plaintiff."

Which motion, having been duly submitted and considered, was by the Court overruled on the 12th day of November, 1907, to which ruling and order plaintiff then and there duly excepted at the time; and thereafter on the 19th day of November, 1907, plaintiff filed a motion to reconsider said last mentioned ruling, which motion was as follows:

In the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.
November Term, 1907.

"Albert Newton Moore by George Safford, Next Friend,
Plaintiff,
vs.
Louisville & Nashville Railroad Company,
Defendant.

Comes now the plaintiff in the above named cause, Albert Newton Moore, by his next friend George Safford, and asks the Court to reconsider its ruling on plaintiff's motion to remand for the reason that the Court erred in refusing to remand said cause from the Federal Court to the State Court and in holding that the plaintiff had waived his objections to the jurisdiction of the Federal Court and had entered a general appearance in said Federal Court, since the plaintiff, being an infant, could not waive any question of jurisdiction either

by himself or by his next friend, and plaintiff asks the Court to consider plaintiff's brief on the subject of waiver by an infant and his next friend herewith filed.

GEO. SAFFORD,
Attorney and Next Friend of Plaintiff."

Which motion to reconsider, having been duly submitted, was by the Court overruled on the 21st day of November, A. D. 1907, to which ruling and order plaintiff, by his counsel, then and there duly excepted at the time; and now plaintiff presents this term bill of exceptions, and prays that the same may be allowed, signed, sealed and made part of the record in this cause which is done accordingly at the same term at which said proceedings took place, as witness the signature and seal of the undersigned as Judge of the United States Circuit Court aforesaid, at the City of St. Louis, Missouri, this 27th day of November, 1907, at the September Term, 1907 of said Court.

DAVID P. DYER, [SEAL]
Judge of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

O. K.
BRYAN & CHRISTIE,
Attorneys for Defendant.

(MEMORANDUM OF OPINION)

Albert N. Moore, by George Safford, Next Friend, etc.,
Plaintiff,
vs.
Louisville & Nashville Railroad Company,
Defendant.

DYER, J.

The plaintiff, Albert N. Moore, is a citizen and resident of the State of Illinois. George Safford, his next friend, is a citizen of St. Louis, Mo., and the defendant is a citizen of Kentucky. A suit to recover damages for personal injuries was brought by the plaintiff against the defendant in the Circuit Court of the City of St. Louis, to the December Term, 1906, of that Court. Upon the return day the defendant appeared and made application to have the cause removed to this court on the ground of diverse citizenship. The Court ordered the removal and the same was filed in this court on the 31st of January, 1907.

On the 22nd of March following the plaintiff by leave of this court filed an amended petition; on the 25th of March a stipulation was made between the parties allowing the defendant until the 30th of March to plead. On the 30th of March motion to strike out amended petition and motion to make same more definite and certain was filed. On May 22nd and on Oct. 8th, stipulations were filed continuing the case; on the 26th of October last the plaintiff filed a motion to remand the case to the State Court. The motion is as follows:

"Comes now the plaintiff, Albert Newton Moore, by George Safford, next friend, and moves this Court to

remand the above entitled cause to the Circuit Court in and for the City of St. Louis, Missouri, on the ground that this Court is without jurisdiction to hear and determine the case".

This motion has been presented very fully on brief.

If the *defendant* had made this motion when the case was first brought, the motion would have been sustained, on the ground that a citizen of Illinois could not sue a citizen of Kentucky in this jurisdiction. But in view of the appearance of the parties in this court (especially by the appearance of the plaintiff), the question of jurisdiction has been waived.

The defendant could have raised the question of jurisdiction in the State Court had it seen proper to do so, but not having raised the question, but on the contrary removed the case, it waived its right to be sued in the district of its residence. Waiving this right it had the right remaining to have the case removed to this court. That having been done the court acquired jurisdiction of the case.

The motion to remand will be denied, and it is so ordered.

United States of America
Eastern Division of the Eastern } ss.
Judicial District of Missouri.

In the Circuit Court of the United States in and for the division and district aforesaid.

I, James R. Gray, Clerk of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the

cause therein entitled, together with all things of and concerning the same, as fully as the same remains on file and of record in said cause in my office.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of said Circuit Court at office in the City of St. Louis in said Division of said District, this 29th day of November, A. D. 1907.

[SEAL]

JAMES R. GRAY,
Clerk of said Court.

Office Supreme Court, U
FILED.
FEB 10 1908
JAMES H. McKENNE

17 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1907; NUMBER

IN THE MATTER
of
ALBERT N. MOORE, an Infant,
by next friend, Petitioner.

BRIEF TO SUPPORT PETITION FOR WRIT OF MANDAMUS

THOMAS T. FAUNTLEROY
SHEPARD BARCLAY
Attorneys and of Counsel for Petitioner

(No.)

ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1907

IN THE MATTER
of
ALBERT N. MOORE, an Infant,
by next friend, Petitioner.

BRIEF TO SUPPORT PETITION FOR WRIT OF MANDAMUS

The application for a *mandamus* to the Circuit Court of the United States to require the latter to remand the action whose record is in that court at present, is based on a total want of jurisdiction in that court to hear and determine that cause.

The plaintiff is an infant and a resident and citizen of Illinois, while the defendant corporation is a resident and citizen of Kentucky. No federal question or cause of action arising under the Constitution or laws of the

United States is involved. We respectfully ask this Honorable Court to issue its writ of *mandamus* to the Circuit Court, as indicated in the Petition, on the facts which are recited therein. We shall submit only a few words of argument, believing that the want of jurisdiction in the trial court is quite manifest in view of a late decision of this Honorable Court to be mentioned later. Our contention is that the cause, while it might properly be brought in the State courts of Missouri, has no lawful place in the federal jurisdiction and should be remanded hence.

I.

The Federal jurisdiction does not reach this cause or properly retain it, in the Circuit Court.

We are aware that it is permissible to invoke the use of the extraordinary writ of *mandamus* to require remand, only upon occasions where the court to which the writ is sought to be directed is **wholly without jurisdiction** to proceed, in the circumstances exhibited. We claim this to be the case, as demonstrated by the record of proceedings submitted here.

The preliminary test to apply is to ascertain whether the cause is one to which the federal jurisdiction extends under the Constitution and laws of the United States by reason of the citizenship of the parties, where (as here) no federal question arises from the facts alleged. That test is usually answered by observing whether the federal jurisdiction would attach, had the action been brought, in the first instance, in the United States Circuit Court in possession of the record.

We claim, most respectfully, that the case in view at this time falls within the ban of the prohibition or ex-

clusion of jurisdiction of federal courts to be found in the language of the federal law governing this subject, as follows:

> "but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought **only in the district of the residence of either the plaintiff or the defendant;**"
>
> 25 Stat. L., c. 366, p. 434
>
> 4 Fed. Stats. Annot. p. 366

The language we have just quoted has much more force than is usually ascribed to it.

Federal jurisdiction in the trial courts depends entirely upon statutory declarations thereof. By that we mean that the statute law of the United States must needs confer jurisdiction in order to permit its exercise. In the language above quoted, however, not only is no jurisdiction conferred, but it is, singularly enough, **expressly forbidden** and excluded. The language is that of the legislative voice of the United States, and to the legislature was confided the power to confer and define the limits of jurisdiction of the federal trial courts. The **expression** of certain facts (as to citizenship) conferring jurisdiction imports the **exclusion** of jurisdiction when those facts do not exist.

The construction of the federal law on this point which we urge, has been so recently the subject of careful attention by your Honors that any elaborate discussion (at least at this stage of the proceedings) seems needless. We consider the case now presented to fall distinctly within your Honors' rulings in

Ex parte Wisner, 203 U. S. 449

This decision is also authority for the correctness of the remedy here sought.

The petition for removal in the case now before us discloses on its face that no federal jurisdiction existed, and it could not thereafter be acquired by consent of an infant. And when jurisdiction in its essential features is wanting, it cannot be acquired in some cases by any consent.

Cochran v. County, 199 U. S. 260
Shaw v. Mining Co., 145 U. S. 444

The principles shown in these cases forbid the enlargement of judicial power in the case at bar by any action on the part of the infant plaintiff.

It was said for the Court by the learned CHIEF JUSTICE in one case:

> "We must hold, therefore, as has indeed already been ruled, Tennessee v. Union & Planters' Bank, 152 U. S. 454, 461, that the jurisdiction of the Circuit Courts on removal by the defendant, under this section, is limited to such suits as might have bren brought in that court by the plaintiff under the first section. The question is **a question of jurisdiction as such and cannot be waived.**"
>
> Railroad v. Davidson, 157 U. S. 208

But in view of the late full discussion in the *Wisner* case, it would seem to be unnecessary to argue further this phase of the case.

II.

The plaintiff, being an infant, could not effectively consent to submit himself to a jurisdiction which would not otherwise exist.

An important query which may be suggested, upon the facts which your Honors will have before you, is

whether or not plaintiff (if of full age and hence capable of consenting) might not submit himself to the federal jurisdiction in a different district by appearing therein.

The law is settled, both in the Federal and State jurisdictions, that where consent is necessary to confer jurisdiction, that **consent must be given by a person capable of such an act,** within the contemplation of law. Infants (for whom as a class all courts have a tender and protective regard) have been universally held **incapable of submitting to the jurisdiction of a court** where the only foundation of jurisdiction was such consent. Decisions can be multiplied in great number to sustain this proposition. We shall cite but a few at this time, however, as we understand the practice to be that an alternative writ will issue upon a *prima facie* showing, leaving to a later period the more thorough and elaborate presentation of the authorities supporting the contentions of the petitioner.

It was forcibly said in a well considered federal case, that "in the event of bringing an original suit against the minor in this Court, **he could only be brought in as a defendant by service of process upon him** in the manner pointed out by law, and that **any waiver** of service of process and entry of his appearance in this Court by attorney or by guardian *ad litem* would be **void and totally inoperative**".

Kingsbury v. Kingsbury, 3 Biss. 60

The annotated report of the above case in 14 Fed. Cas. p. 585 (No. 7817) should also be consulted, as the note thereto contains citations of a large number of decisions to which we refer without repeating them here.

The precept of law is quite universally recognized

that **infants have no power to take any steps in Courts of Justice** which require for validity the independent action of a competent individual. This precept finds illustration in the rule of law which makes contracts of infants voidable unless for necessaries; the exception itself resting upon, and being supported only by, the necessity which the word implies.

In matters of procedure it is held, quite generally, that, in the progress of a cause, important steps which depend upon consent cannot be taken upon such consent of a next friend or guardian *ad litem*, so as to charge an infant as if it was his personal act.

The principle which applies is that their consent is worthless in those matters whose validity depends entirely upon their consent.

Thus it was held that the consent of the guardian *ad litem* to the reference of a cause (on behalf of the infant whom he represented) was **absolutely void** and conferred no authority upon the Referee.

Gamache v. Prevost, 71 Mo. 84

An infant can not consent to submit to jurisdiction, appearing by attorney.

Bailey v. McGinniss, 57 Mo. 362
Copeland v. Yoakum, 38 Mo. 349

An appearance of an infant by his guardian, where the infant **had not been served with process,** is void, and so is a judgment based thereon.

Gibson v. Chouteau, 39 Mo. 565
Nagel v. Schilling, 14 Mo. Ap. 576

In an action at law, the next friend is really not a party; he is not even liable for costs.

Crandall v. Slaid, 11 Metc. 288
Brown v. Hull, 16 Vt. 673
Sinclair v. Sinclair, 13 M. & W. 640

It was held in an opinion of this Court (without dissent) that, "it is undoubtedly the rule in Illinois, as elsewhere, that a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant".

Kingsbury v. Buckner, 134 U. S. 680

Your Honors will also find a careful opinion, involving this subject, wherein that well remembered jurist, Chancellor WALWORTH, determined that a jurisdictional defense would be interposed by the Court for an infant, although it had not even been suggested by the guardian *ad litem*.

Bowers v. Smith, 10 Paige 204

But we forbear any great length of citations on this line as we regard the principles we invoke to be entirely familiar to your Honors.

CONCLUSION

The principles governing this cause seem to us elemental, though all rulings on jurisdictional questions in this High Court are serious, and call for most careful consideration, because, usually, of their extensive application in practice throughout the United States. We could have massed a great array of decisions to prove that an infant cannot properly give consent to

the assumption of jurisdiction over his person or property which jurisdiction could not otherwise lawfully be exercised, but we believe that rule to be so well grounded that elaborate discussion thereof is unnecessary here.

We submit the petition to your Honors, believing that the writ should issue as prayed.

THOMAS T. FAUNTLEROY,
SHEPARD BARCLAY,
Attorneys and of Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907

IN THE MATTER
OF
ALBERT N. MOORE, AN INFANT,
BY NEXT FRIEND,
Petitioner

MOTION FOR PEREMPTORY MANDAMUS.

Now comes petitioner herein and moves this Honorable Court to make the order for a *mandamus* peremptory as prayed in the petition herein, and to make such further orders as the court may deem appropriate to require a remand of the cause of Albert N. Moore, an infant, *plaintiff*, vs. Louisville & Nashville Railroad Company, *defendant*, to the Circuit Court, City of St. Louis, Missouri, for the reasons following:

1. Because the state Circuit Court, City of St. Louis, Missouri, **has never lost jurisdiction** over said action as pending therein; said cause not having been duly removed into the federal jurisdiction, as appears from the record of proceedings in said state Circuit Court;

2. The Circuit Court of the United States in and for the Eastern Division of the Eastern

Judicial District of Missouri has **no jurisdiction over said cause,** in manner and form as the same was pending in said state Circuit Court;

3. The return to the alternative order in mandamus herein does not state facts sufficient to constitute any defense or reason why said alternative order should not be made peremptory.

4. Because the return is **insufficient in law** and states no sufficient ground why the alternative order should not be made absolute.

GEORGE SAFFORD,
As Next Friend,

THOMAS T. FAUNTLEROY,
SHEPARD BARCLAY,
Attorneys and of Counsel for Petitioner.

ST. LOUIS, MO., MARCH 5, 1908.

Service of copy of above motion for peremptory *mandamus* acknowledged in the matter of Albert N. Moore, petitioner.

P. TAYLOR BRYAN,
HARVEY L. CHRISTIE,
HAROLD R. SMALL,
Of Counsel for Respondent.

BRIEF FOR PETITIONER ON MOTION FOR PEREMPTORY MANDAMUS.

In this cause original in this Court leave was granted to file a petition for *mandamus*, upon which a rule to show cause was entered, returnable in due course.

Petitioner moves (upon the return) for a peremptory mandamus, on the ground that, upon the admitted facts, the state court has never lost jurisdiction over the action as pending there, and the Federal Circuit Court has no jurisdiction thereof, save to enter an order to remand.

The facts are within a narrow field.

The record here shows that plaintiff, when the action began, was an **infant** under twenty-one and over fourteen years of age, having no guardian, and that defendant was then a railroad corporation of KENTUCKY (Printed Record, pp. A1, A4). **A next friend** was appointed for plaintiff by the Circuit Court in the City of St. Louis on the petition of plaintiff, under the laws of Missouri (Printed Transcript, A2).

The local statutes (so far as material) providing for such appointments for infant plaintiffs are as follows:

Missouri law concerning next friends.

"Sec. 550. SUITS BY INFANTS, PROSECUTED BY WHOM.—Suits by infants may be commenced and prosecuted, either: First, by the guardian or curator of such infant; or, second, **by a next friend** appointed for him in such suit. (R. S. 1889, Sec. 1997)."

"Sec. 551. NEXT FRIEND, BY WHOM APPOINTED.—The appointment of a next friend for an infant **shall be made by the court in which the suit is intended to be brought,** or by a judge or clerk thereof. (R. S. 1889, Sec. 1998)."

"Sec. 552. HOW APPOINTED.—Such appointment shall be made on the petition in writing

of such infant, if of the age of fourteen years, and the written consent of the person proposed to be next friend to such infant acknowledged before, or proved to the court or officer making the appointment. (R. S. 1889, Sec. 1999)."

"Sec. 554. NEXT FRIEND TO GIVE BOND. —Before any person shall be appointed next friend for an infant in any suit to recover any personal property, debt or damages, he shall, if required by the court or officer to whom application for such appointment shall be made, execute a bond to such infant in double the amount claimed in such suit, with such securities as shall be approved by the court or officer, conditioned that such next friend shall account to such infant for all money or property which may be recovered in such suit. (R. S. 1889, Sec. 2001)."

* * * * * * * * * * *

"Sec. 556. PETITION AND APPOINTMENT TO BE FILED BEFORE FURTHER PROCEEDINGS.—The petition for the appointment of a next friend, the written consent of the person proposed to be next friend, and the order of appointment shall be filed in the office of the clerk of the court where the suit is proposed to be brought, before any proceedings shall be had in the cause. (R. S. 1889, Sec. 2003)."

"Sec. 557. GUARDIAN AND NEXT FRIEND LIABLE FOR COSTS.—The guardian or next friend of any infant who commences or prosecutes a suit shall be responsible for the costs thereof, unless such infant be permitted by the court to sue as a poor person, as provided by law. (R. S. 1889, Sec. 2004)."

R. S. Mo. 1899, Secs 550-557.

Where there is a general guardian or curator, appointed by the Probate Court, it is his duty to represent his ward in all legal proceedings, and to prosecute and defend for the ward without further admittance, in

the several courts of the state. (R. S. Mo. 1899, Sec. 3497.)

Under these state laws, the next friend for plaintiff was appointed **"by the court in which the suit"** was **"intended to be brought"** (to quote the above statute) and plaintiff by his next friend began a suit in that court against defendant for $20,000 damages for personal injuries sustained in Illinois, by reason of alleged negligence of defendant. The latter, in time, was served with process in Missouri, as a foreign corporation, so that the circuit court of that state **acquired full jurisdiction** over the cause and over the defendant personally.

At the return term of the summons, defendant filed a

Petition for Removal

to the United States Circuit Court (Printed Record, p. A11) solely on the supposed ground of diverse citizenship of the parties; yet the petition of defendant affirmatively alleges that PLAINTIFF is a citizen and resident of ILLINOIS, the next friend, "a citizen and resident of the State of Missouri" (*nothing said* in regard to *district* of his residence), and that DEFENDANT is a citizen and resident of KENTUCKY.

The defendant's own petition for removal discloses, on its face, that there was no ground for removal under the constitution and laws of the United States, and the jurisdiction of the state court was, therefore, not divested by the futile effort to effect a removal.

Nevertheless, the state court made an order approving the bond (submitted by defendant at the time) and directed the clerk to certify a transcript of the record to the Circuit Court of the United States, as prayed; which was accordingly done.

In the Federal Court

no appointment of a next friend for plaintiff was made, but an amended petition was filed, and by stipulations the defendant's time to plead was enlarged, and the cause was continued.

A Motion to Remand

to the state court was then filed for plaintiff, and overruled by the court (Printed Record, p. A28), after which a motion to re-consider that order met a like fate, and after duly saving exceptions (in the usual way) the pending application for mandamus was presented to this Court.

There is no claim (and could be none successfully maintained) of **any federal question** arising on the pleadings in the main case.

I.

The petition for removal discloses **by affirmative facts** that the case was NOT REMOVABLE, and hence the JURISDICTION of the state court **was not divested,** but CONTINUES.

The federal law ordains that where the foundation of jurisdiction in the federal court rests upon diverse citizenship "suit shall be brought ONLY in the district of the **residence of either the plaintiff or the defendant."**

25 Stat. L. c. 366, p. 434;
4 Fed. Stats. Annot., p. 366.

This is a PROHIBITION as well as an authority. It excludes (by use of the word "*only*") federal jurisdiction in cases where suit is brought **otherwise** than as authorized, in the district of residence of either plaintiff *or* defendant.

When the removal petition was filed in the state court,

this cause was not removable on the facts therein alleged. Those facts made a clear showing that the cause was not subject to be removed. Hence the jurisdiction of the state court was not divested. It continues, despite the filing of the insufficient and totally deficient petition for removal.

To cite the lucid exposition of this topic by the honored senior member in service in this Honorable Court:

> "A case is not, in law, removed from the state court, upon the ground that it involves a controversy between citizens of different states, unless, at the time the application for removal is made, the record, upon its face, shows it to be one that is removable. We say, upon its face, because 'the state court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further;' and 'all issues of fact made upon the petition for removal must be tried in the Circuit Court.' *Stone vs. South Carolina*, 117 U. S. 430, 432; Carson vs. Hyatt, 118 U. S. 279, 287. If the case be not removed **the jurisdiction of the state court remains unaffected,** and, under the act of Congress the jurisdiction of the federal court **could not attach until it becomes the duty of the state court to proceed no further.** No such duty arises unless a case is made by the record that entitles the party to a removal."
>
> Crehore vs. Ohio, etc. Ry., 131 U. S. 244.

No amount of action in the federal court, after an ineffective effort to transplant the cause there, will destroy the jurisdiction continuing over the cause in the state court. That jurisdiction cannot be obliterated by anything afterwards occuring in the federal court.

In an earlier case it was said:

> "The order to remand can be made at any time during the pendency of the cause when it shall appear there is no jurisdiction. The fact that Ebenezer R. Ayres had filed his answer in the United States Court is a matter of no importance. That fact did not of itself confer jurisdiction if there had been none before. It will be for the State Court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken **during the pendency of the suit in the other jurisdiction.**"
>
> Ayres vs. Wiswall, 112 U. S. 190 (191).

Much later, the learned CHIEF JUSTICE has held, on this point:

> "The cause was not properly removed, and **the state court has never lost jurisdiction.** *Stevens* vs. *Nichols*, 130 U. S., 230; Crehore vs. Ohio & Mississippi Railway Co., 131 U. S., 240, and cases cited."
>
> Young vs. Parker, 132 U. S. 267 (271).

The contention advanced by respondent in the case at bar, suggesting that some moves in the federal court have "**waived**" the right to remand and thereby, we are told, conferred jurisdiction, not otherwise or previously existing, is met by the facts and unanimous rulings thereon by this High Court in several cases, of which we will examine a few clear types. In some of the following decisions it will be found that the disclosed facts of citizenship would have **sustained the jurisdiction** if the suits had been **first filed in the federal court,** and no objection to jurisdiction had been entered, but because the removal petitions were defective, in their allegations of citizenship, **when the suit was begun,** the causes were ordered remanded, **after trial on the merits;** in one instance, although it does not appear that the question of jurisdiction was raised in

the court below by any plea or motion (158 U. S. 57) and, in another, **"no question was made in the court below"** (130 U. S. 231), in regard to the right to remove into the federal court.

La Confiance Comp'ie vs. Hall, 137 U. S. 61;
Stevens vs. Nichols, 130 U. S. 230;
Kellam vs. Keith, 144 U. S. 568;
Graves vs. Corbin, 132 U. S. 571;
Jackson vs. Allen, 132 U. S. 34;
Mattingly vs. R. R., 158 U. S. 53.

WAIVER THEORY.

We regard the foregoing decisions as a complete and emphatic answer to the theory advanced in this cause (in the federal trial court) to the effect that by the proceedings in that court *"the question of jurisdiction has been waived"* (quoting the memorandum opinion of the learned district Judge, respondent. Printed Record, p. A36). The *"waiver theory"* is rested on the contention that, as a party may waive his right to be sued in the district of his residence his appearance in the cause, although improperly removed, gives jurisdiction to the federal court to proceed, thereby sending the case on its new federal road rejoicing, while, at the same time, the case may, we suppose, concurrently proceed along the old path of jurisdiction in the state court where the defective removal petition has left it, under your Honors' repeated rulings. These beautiful consequences and a dual progress of the cause in TWO JURISDICTIONS would follow the sanction of the *"waiver theory,"* as developed by the case at bar. See comment thereon

Endy vs. Ins. Co., 24 Fed. 657.

The jurisdiction of the federal court in removed causes is *derivative*, not original; and jurisdiction over removed causes, or others where jurisdiction is derivative, cannot be acquired as if they had been first brought in the federal jurisdiction.

This is a general rule of procedure as well as of substantive jurisprudence, and it is exemplified by many decisions (of which we cite a few only) declaring that jurisdiction over a particular cause must be acquired as the law directs, and not otherwise; so that although an action may be within the original jurisdiction of a court, yet if the cause is brought within its purview by invoking its derivative or appellate jurisdiction, in some unauthorized manner, the original jurisdiction cannot avert the consequences of such deficiency of procedure, nor can consent in such case confer jurisdiction over the cause.

State vs. Potter, 16 Kansas, 80;
Robinson vs. Walker, 45 Mo., 120.

As was said in another Missouri case:

> "Unless the appeal had the effect to remove the cause to the circuit court, that court acquired no jurisdiction to try the same anew, even though the parties appeared and participated in the trial had. The judgment of the justice would be final and conclusive."

Moulder vs. Anderson, 63 Mo. Ap., 39.

A lucid illustrative case on this point is found in New York where the court, in reviewing the record of a cause which had reached the old Common Pleas Court improperly by appeal from a justice of the peace, was confronted by the argument that as the case was one over which the Common Pleas had original jurisdiction, the defective appellate steps were immaterial. The court (per SUTHERLAND, J.) said (following earlier decisions cited):

"The parties are considered as having a standing in court only by force of the appeal; and, although the subject matter of the suit be one over which the court might have had original jurisdiction, yet having been brought there by appeal, the subsequent acts of the parties are considered as compulsory, and not as intended voluntarily to confer jurisdiction upon the court. The act creates a new mode of transferring suits originally commenced before justices of the peace to the court of common pleas. It confers a new and peculiar jurisdiction upon those courts, which vests only upon a strict compliance by the parties with all the requirements of the act."

Latham vs. Edgerton, 9 Cow. 229.

This reasoning is peculiarly applicable to the federal jurisdiction and to the modes of bringing causes within it. The removal of a cause into the federal court cannot be accomplished by mere consent of parties or by their "*waiver*" of the question of jurisdiction over the cause, after removal. To permit such results would afford easy methods of conferring federal jurisdiction by collusion, as pointed out by Mr. JUSTICE MILLER, in touching on this subject:

"This court has uniformly acted upon the principle that in order to protect itself from collusive agreements between parties who wish to litigate their controversies in the federal courts, it would, on its own motion, take the objection of the want of jurisdiction in the circuit court, **especially as regards citizenship.** Hilton vs. Dickinson, 108 U. S. 165; Morgan's Executor vs. Gay, 19 Wall. 81."

Cameron vs. Hodges, 127 U. S. 325.

Every form of collusive jurisdiction or that acquired

by mere consent is beyond the pale of federal cognizance.

Turnbull vs. Ross, 141 Fed. 649.

In a well considered recent opinion by Judge LACOMBE it is held that where a federal court is without jurisdiction on removal "it is not conferred by the acts of the plaintiff in **participating in the steps taken in the suit after removal.**"

Crane Co. vs. Guanica Centrale, 132 Fed. 713.

To the same effect are:

Cella vs. Brown, 144 Fed. 742;
Mitchell Co. vs. Worthington, 140 Fed. 947.

Moreover, the *"waiver theory"* must depend solely upon the application of original jurisdiction in the federal circuit court to proceedings instituted therein by **removal process.** And if the original jurisdiction of the court is to be invoked to sustain such proceedings, the pleadings in the federal court must affirmatively show the requisite diverse citizenship, without resorting to facts alleged in the removal petition. In the case at bar neither the **amended petition** (Record, p. A17) nor any other paper avers diverse citizenship of the parties, save the removal petition, and the latter discloses on its face, that the cause **was not removable,** and that the jurisdiction of the state court over the cause was therefore not impaired, affected or divested. It is very trite law that federal jurisdiction, when founded on diverse citizenship, must **affirmatively appear** in the record. So that if "the question of jurisdiction has been waived," so that a motion to remand is no longer in order, **the pleadings in the federal court** should, at least, show the **facts of existing diverse citizenship** to which the federal

jurisdiction might attach (without reference to the abortive removal petition) which in this case those pleadings fail to do. And if such a *"waiver"* theory is set up, the averments of **diverse citizenship,** essential to connect the case with the **original** jurisdiction of the federal court, must then refer to **that very time** when such jurisdiction is invoked. This is a rule of pleading illustrated by many decisions, demonstrating that such allegations must directly aver the very time when the jurisdiction attaches; otherwise no federal jurisdiction exists.

Stevens vs. Nichols, 130 U. S. 230;
Mattingly vs. Railroad, 158 U. S. 53;
Graves vs. Corbin, 132 U. S. 585;
Merchants Co. vs. Ins. Co., 151 U. S. 384;
Railway vs. Twitchell, 59 Fed. 727;
Crasswell vs. Belanger, 56 Fed. 529;
MacNaughton vs. Railway, 19 Fed. 881.

So no supposed claim can be maintained in invoking original federal jurisdiction on the record of the cause made since the transcript of the state court proceedings was filed in the federal court. If such a claim of **"waiver,"** in the case now under review, has any substance, it was equally applicable in many of the cases wherein your Honors held that no federal jurisdiction attached, for want of proper facts alleged in the removal petition, despite the fact that the cases (after removal) had been **tried on their merits** in the federal court (involving all sorts of appearances meanwhile by all parties) and had come regularly into this high court for review, without objection on such ground.

If your Honors will examine the facts in the *Mattingly* case, you will see that Mr. Mattingly was a citizen and resident of WEST VIRGINIA, and the Baltimore & Ohio Railroad Company, a MARYLAND corporation. The suit

might **properly have been maintained if originally begun in the federal court,** and no objection for want of jurisdiction had been made. Defendant had filed its answer. In the federal court the cause was **"heard and decree rendered"** (p. 56) yet this court reversed the decree and remanded the cause with a direction to remand to the state court, because the removal petition alleged that plaintiff *"is"* a citizen of West Virginia and did not allege that he *was* such a citizen **"at the time of the commencement of the action."**

Notwithstanding the appearance of the parties below, as necessary to a hearing and final decree, the federal jurisdiction was denied by this Honorable Court in an opinion by His Honor, the CHIEF JUSTICE, without dissent.

Mattingly vs. Railroad, 158 U. S. 53.

In that case the learned opinion says:

> "Although it does not appear that the question of jurisdiction was raised in the court below by any plea or motion, yet as the record **failed to affirmatively show jurisdiction,** this court must take notice of the defect."

In the earlier unanimous decision by Mr. JUSTICE HARLAN (later mentioned by Mr. JUSTICE BREWER in the report on a second writ of error in the same action, Stevens' Admr. vs. Nichols, 157 U. S. 370), the record disclosed that Mr. Nichols *"is"* a citizen of Missouri, and defendants *"are"* citizens of New York, which would have furnished sufficient basis to sustain **original jurisdiction** of the federal court in Missouri by consent of parties; yet because the removal petition did not aver diverse citizenship **"at the time of the commencement of the action,"** this court held that the federal circuit court acquired *no jurisdiction*, although "in the latter court,

the necessary pleadings having been filed, the case **was tried"** (to quote the official report, p. 231)

Stevens vs. Nichols, 130 U. S. 230.

In that case the report states:

> "No question was made in the court below or in this court as to the right of Stevens & Mirick to remove the case from the state court" (p. 231).

But the reversal of the judgment for want of jurisdiction, **after trial,** in a case which **might fall within the original jurisdiction of the federal trial court,** on the facts recited in the removal petition, indicates the utter untenability of the *"waiver"* theory advanced in the case at bar to maintain federal jurisdiction founded on supposed diverse citizenship.

In the *Crehore* case (an action for personal injuries) decided in an opinion by Mr. JUSTICE HARLAN, there had been a **trial on the merits** in the federal court, after removal from the state court; yet the federal jurisdiction was denied and the cause ordered remanded to the state court because the removal petition was defective in failing to aver diverse citizenship **"at the commencement of the action** in the state court." This court also refused to grant leave to amend the removal petition, despite the earnest argument therefor by Hon. LAWRENCE MAXWELL, JR., one of the ablest members of the bar of this court.

Crehore vs. Railway, 131 U. S. 240.

In the *Kellam* case the petition for removal averred diverse citizenship, *in the present tense*, but was silent thereto in regard to the time *when the suit in the state court was* BEGUN. In the federal court the pleadings were *"recast"* (p. 569) and in the amended bill in equity, which

was filed by plaintiff, proper diverse citizenship was alleged (p. 569). The cause was then tried and a decree rendered. On appeal this court, by his Honor, the CHIEF JUSTICE, held that there was no federal jurisdiction on account of the fatal omission to aver the requisite citizenship when the suit in the state court was commenced.

Kellam vs. Keith, 144 U. S. 568.

The late Mr. JUSTICE BLATCHFORD, in his day, clearly summarized the result of the decisions regarding jurisdiction in causes removed from the state courts on the ground of diverse citizenship, and declared:

> "Where a suit is entered upon the docket of a circuit court as removed on the ground of the diverse citizenship of the parties, and was never in law removed, **no amendment of the record made in the circuit court can affect the jurisdiction of the state court, or put the case rightfully on the docket of the circuit court as of the date when it was so docketed."**

Graves vs. Corbin, 132 U. S. 590.

That ruling was made in a cause which, because of the citizenship of the parties, **could have been maintained in the original jurisdiction of the federal circuit court,** if no objection thereto had been interposed; none was interposed; yet as a REMOVED CASE, after full hearing and a decree in the federal court for plaintiff, who had been **"taken into that court adversely"** (p. 591) the decree was reversed, and the cause was ordered remanded to the state court, following the precept last above quoted, which we respectfully ask to have applied in the case at bar.

It has been held, indeed, that if the removal petition is merely deficient *in form*, but is good in its **substantial**

showing of jurisdictional citizenship, it may be amended in the federal court; but this may **not be,** where (as *in the case at bar*) the removal petition boldly proclaims facts which *forbid* the removal under the existing national laws.

On this point Mr. JUSTICE GRAY, writing for all the court, said:

> "A petition for removal, when presented to the state court, becomes part of the record of that court, and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends; because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction, and if it does, the Circuit Court of the United States cannot allow an amendment of the petition, but must remand the case. *Crehore vs. Ohio & Mississippi Railway*, 131 U. S. 240; *Jackson vs. Allen*, 132 U. S. 27. But if, upon the face of the petition and of the whole record of the state court, sufficient grounds for removal are shown, the petition may be amended in the Circuit Court of the United States, by leave of that court, by stating more fully and distinctly the facts which support those grounds. *Carson vs. Dunham*, 121 U. S. 421, 427; *Martin vs. Baltimore & Ohio Railroad*, 151 U. S. 673, 690, 691."
>
> Powers vs. Ry., 169 U. S. 101.

The more recent decisions do not impair or limit the scope of those rulings, but on the contrary confirm them.

> Kinney vs. Assn., 191 U. S. 78;
> *Ex parte* Wisner, 203 U. S. 449.

The law regarding *ex post facto* amendments of petitions for removal is settled by your Honors' judgments, sustaining, we respectfully submit, our contentions for petitioner herein.

We respectfully refer in this connection to the emphatic words of the learned CHIEF JUSTICE:

> "We must hold, therefore, as has indeed already been ruled, *Tennessee vs. Union & Planters' Bank*, 152 U. S. 454, 461, that the jurisdiction of the circuit courts on removal by the defendant, under this section, is **limited to such suits as might have been brought** in that court by the plaintiff under the first section. **The question is a question of jurisdiction as such and cannot be waived.**"

Railroad vs. Davidson, 157 U. S. 208.

The precepts announced in these decisions naturally led to the latest ruling which declared that, where the state jurisdiction had not been divested, substantially as provided by the federal law, it **continued to hold the cause.** Assuming that proposition to be well grounded, does it not follow that **no amount of moves,** by either or both parties in the federal court could **cure** fatal blemishes flaunted openly in the removal petition?

Ex parte Wisner, 203 U. S. 449.

Many more decisions could be cited to the same general purport as those above mentioned, but we consider the subject to be so familiar to your Honors as renders further citations unnecessary.

A summary of the established doctrine governing this topic is found in a very useful treatise in general use, as follows:

> "WAIVER OF RIGHT OF REMAND—(1) FOR WANT OF JURISDICTION.—Since the federal court cannot take jurisdiction of a cause by the mere consent of parties, the right to have the cause remanded for want of jurisdiction **cannot be waived by lapse of time** nor **by any proceedings** taken in the cause **in the federal court.**"

Indiana vs. Lake Erie, etc. R. Co., 85 Fed. Rep. 2;
Frisbie vs. Chesapeake, etc. R. Co., 57 Fed. Rep. 1;
Southworth vs. Reid, 36 Fed. Rep. 451;
Bronson vs. St. Croix Lumber Co., 35 Fed. Rep. 634;
Indiana vs. Tolleston Club, 53 Fed. Rep. 18;
Wabash R. Co. vs. Barbour, 73 Fed. Rep. 513;
Mexican Nat. R. Co. vs. Davidson, 157 U. S. 201;
Ayers vs. Watson, 113 U. S. 598;
Mansfield, etc. R. Co. vs. Swan, 111 U. S. 379;
Martin vs. Baltimore, etc. R. Co., 151 U. S. 690;
18 Enc. Pl. & Pr., 369.

We add further:

Crane Co. vs. Guanica Centrale, 132 Fed. 713;
Olds Wagon Works vs. Benedict, 67 Fed. 1;
Parkinson vs. Barr, 105 Fed. 81.

The effect of filing an amended petition after removal, on which the supposed "waiver" here, in the case at bar, is founded, was considered in the decision last above cited. The court's view thereof is briefly given in the headnote as follows:

> "A plaintiff, by appearing in the federal court after the removal of the cause, and obtaining **leave to file an amended complaint,** does NOT thereby waive his right to move to remand."

II.

The right of removal is **determined by the facts as disclosed by the removal petition,** and if the latter is defective *in substance* (and, for stronger reason, if it **affirmatively shows,** as in the case at bar, that the cause is NOT REMOVABLE), neither consent nor failure to raise

the issue of jurisdiction can impart life to the attempt at removal.

If, as held in decisions already cited, a SUBSTANTIAL defect in the petition for removal cannot be amended or cured thereafter so as to confer jurisdiction by averments of requisite diversity of citizenship (truly existing), it follows that federal judicial power over a removal cause **cannot be acquired later** by appearances or by steps in pleading, or even by a trial of the merits, all implying consent to the jurisdiction. So the decisions of this court affirm, on the oft repeated ground that consent does not confer jurisdiction upon removal causes.

It is not to be denied that there are decisions asserting that one sued in the federal court of a district whereof he is not a resident may submit to jurisdiction by not objecting. Whether they are sound or not, in view of the history of the changes in the law of this subject, we do not pause to discuss, content to deal with the actual facts in judgment. Here the federal jurisdiction is not invoked **originally,** but it depends, according to a multitude of decisions, on certain essential steps before it becomes operative, so as to remove and transplant a particular cause OUT OF the state jurisdiction as well as INTO the federal cognizance. That transplanting process has a LAW OF ITS OWN, defined by the statutes on removal of causes. That law has been steadily and definitely construed for years along the lines marked out by the *Stevens* case (130 U. S. 230) and many others already cited. Why should that construction be cast aside? It merely asserts that until the state court's power to deal with the cause is dislodged, by a showing of facts with which the federal power is lawfully authorized to deal, the state jurisdiction continues.

> "'Tis well to be off with the old love
> Before you are on with the new."

We venture to add:

'Tis well to be off with the old court
Before you are into the new!

Unless that precept be obeyed, we shall have divided powers in the same case, in federal and state courts, the evils of which were so well pointed out by Judge SAWYER in his opinion already cited (24 Fed. 657).

The latest and most distinct announcement on this point in this court has been in the *Wisner* case (203 U. S. 449), which we assume was most carefully considered; and it has been followed (in the interpretation which we maintain) in later cases.

Baxter Co. vs. Mfg. Co., 154 Fed. 992;
Yellow Aster Co. vs. Crane Co., 150 Fed. 580;
Goldberg Co. vs. Ins. Co., 152 Fed. 834.

The purport and purpose of the latest amendments of the law regulating federal jurisdiction have been toward limiting and reducing its scope, especially in respect of diverse citizenship. The history of those amendments has been sketched in several learned opinions.

In re Hohorst, 150 U. S. 653;
Cochran vs. County, 199 U. S. 260.

The intent and object of those changes of law, restricting and narrowing the exercise of federal judicial power, are manifest, and have been fully conceded.

Foulk vs. Gray, 120 Fed. 156, and the many decisions cited therein.

Divestiture of state jurisdiction in a pending action can be effected only by substantial compliance with federal law. That law, by its own terms, declares that, if the federal court, **at any time,** becomes satisfied that

a cause is not properly within its authority, it "shall proceed no further therein," but (in case of removal) "remand it to the court from which it was removed," etc.

These provisions should be interpreted in harmony with the general spirit and intent implied by the latest amendments to the law, and not accorded a reading which would defeat the restrictive purposes contemplated by their enactment.

Missouri Pac. Ry. vs. Fitzgerald, 160 U. S. 580.

III.

But if it were possible for a competent party to "waive the question of jurisdiction," such a rule could not apply to the case of an infant plaintiff, whose incapacity to waive any substantial right the courts should always protect.

The attitude of an infant in respect of the subject of waiver (which seems to have been the foremost thought in the mind of the learned trial judge) is different from that of an adult.

It must be noted first that there **has been no appointment of a next friend** in the federal court. The appearance of a next friend, there, cannot be taken to bring the infant within federal jurisdiction. Until a next friend is appointed **"by the court in which the suit is intended to be brought"** or by a judge or clerk thereof (to quote the Missouri Statute, R. S., 1899, Sec. 551) an infant cannot become subject to the jurisdiction of a court.

Coal Co. vs. Hays, 97 Ala. 201 (12 So. 98).
R. S., Mo., 1899, Sec. 556.

The appearance of an infant by a next friend or

guardian *ad litem* is not, of itself, sufficient to bring the person of the infant within the jurisdiction of a court. Even a judgment founded on such an appearance has been held void, and other rulings in many ways assert the force of the last stated proposition.

10 Ency. Pl. & Pr., p. 613 and cases;
Nagel vs. Schilling, 14 Mo. App. 576;
Ingersoll vs. Mangam, 84 N. Y. 622;
Carver vs. Carver, 64 Ind. 194;
Martin vs. Starr, 7 Ind. 224;
Gray vs. Palmer, 9 Cal. 616;
Frazier vs. Pankey, 1 Swan (Tenn.) 75;
Clark vs. Thompson, 47 Ill. 25;
Bonnell vs. Holt, 89 Ill. 72;
Dickison vs. Dickison, 124 Ill. 483;
Fitch vs. Cornell, 1 Sawy. (U. S.) 157;
Greenman vs. Harvey, 53 Ill. 386.

The rule in Missouri on this subject is unquestionable.

Hendricks vs. McLean, 18 Mo. 32;
Gibson vs. Chouteau, 39 Mo. 537;
Shaw vs. Gregoire, 41 Mo. 407;
Railroad vs. Campbell, Nelson & Co., 62 Mo. 585;
Campbell vs. Laclede Gas Light Co., 84 Mo. 352;
Fischer vs. Siekmann, 125 Mo. 165;
Bogart vs. Bogart, 138 Mo. 419.
Wright vs. Hink, 193 Mo. 130;
McMurtry vs. Fairly, 194 Mo. 502, 91 S. W. 90.

The fact that the next friend, appointed in and for the State Court of Missouri, is a citizen of that state, does not confer the requisite jurisdiction to support a removal of the cause to the federal court. The removal petition DOES NOT AVER that he is **a resident of the district** within which the federal court is territorially bounded. If his

citizenship has any significance, the essential allegations on which to found a suit in the federal trial court are wanting in the removal petition.

It may be conceded that representatives of some persons beneficially interested are occasionally vested with such a title or possession of property as to permit their citizenship to sustain federal jurisdiction in cases where they are parties to litigation. Cases can be found holding, in some instances, that citizenship of an executor or guardian will be sufficient to bring his case within federal juridical authority (the other appropriate facts existing). But a **next friend,** appointed to institute a suit for damages, more nearly resembles an attorney. He is not vested with title to property. He is not strictly a party to the suit (although liable for costs, as a security for costs might be) and in determining the question of citizenship for the purpose of locating federal jurisdiction, the citizenship of the infant plaintiff himself and not the next friend must be considered. The citizenship of a next friend, such as the Missouri statutes describe and habilitate, can neither create nor defeat federal jurisdiction. He is not a PARTY TO THE ACTION, within the purview of the federal law concerning diverse citizenship.

Williams vs. Ritchey, 3 Dill. 406;
Blumenthal vs. Craig, 81 Fed. 320;
Crandall vs. Slaid, 11 Metc. 288;
Voss vs. Neineber, 68 Fed. 947;
Morgan vs. Potter, 157 U. S. 195;
Brown vs. Hull, 16 Vt. 673;
Sinclair vs. Sinclair, 13 M. & W. 640;
Jones vs. Railway, 178 Mo., 542;
Bryant vs. Livermore, 20 Min. 343;
Duffy vs. Pinard, 41 Vermont 297;
Mason vs. McCormick, 75 N. C. 263.

His position is rather that of an attorney, with strictly limited powers.

Anon, 2 Hill (N. Y.) 417;
Tate vs. Mott, 96 N. C. 22 (2 S. E. Rep. 176).

A guardian *ad litem* or next friend "cannot, by admissions or stipulations, surrender the rights of the infant."

Kingsbury vs. Buckner, 134 U. S. 680.

A next friend must be appointed by the court "in which the suit is intended to be brought," according to the Missouri statute (R. S., Mo., 1899, Sec. 551), which we assume furnishes a guide to like procedure in the federal court in actions at law, there being no different federal statute, and such procedure being within the scope of the "conformity" act.

R. S., U. S. Sec. 914.

A next friend appointed by a state court could not institute an action for the minor in a federal court, and thereby bring his infant charge into the latter court without an appointment by the federal court, if the ORIGINAL jurisdiction of the latter is to be invoked. The authority of such a representative of a minor is limited to the field or domain in which he is expressly authorized to serve or act.

Morgan vs. Potter, 157 U. S. 197.
R. S., Mo., 1899, Sec. 556.

So that if it is claimed here that the next friend (appointed by the state court) could confer jurisdiction by waiving objection to original jurisdiction in the federal court, we respectfully insist that an **appointment as next friend by the federal court** would be essential for that purpose, under the decisions already cited.

One interesting section of Missouri law casts light on this phase of the case. The Missouri Code of Practice, in the Statute of Jeofails, declares that no verdict or judgment shall be reversed, impaired or affected by:

> "Seventh, for any party under twenty-one years of age having appeared by attorney, if the verdict or judgment be for him."
>
> R. S. Mo. 1899, Sec. 672.

This statute has been frequently enforced.

> Taylor vs. Pullen, 152 Mo. 440;
> Lyddon vs. Dose, 81 Mo. App. 64.

This provision of law implies (when read in conjunction with the sections 551 and 556, requiring appointment of a next friend by the court wherein the action "is intended to be brought," and declaring that such an order of appointment shall be filed, **"before any proceedings shall be had in the cause")** a corollary:— that, without an appointment of a next friend for an infant plaintiff, any proceedings **against his interest** will not be valid.

The terms of section 556 (R. S. Mo., 1899) clearly forbid any steps for an infant plaintiff without appointment of a next friend by the court where the appearance for him is to be made. If it is to be applied, it clearly forbids a **"waiver"** of "objection to jurisdiction" by a next friend, in another court than that of his appointment. This accords with hosts of decisions holding that a judgment or decree, based on a jurisdiction obtained over an infant by appearance of his guardian *ad litem*, is VOID.

> O'Hara vs. MacConnell, 93 U. S. 150;

Ins. Co. vs. Bangs, 103 U. S. 435;
Hatch vs. Ferguson, 57 Fed. 966;
Ingersoll vs. Mangam, 84 N. Y. 622;
Kingsbury vs. Kingsbury, 14 Fed. Cas., p. 585 (No. 7817) and note.

An infant's personal acceptance of service is void to confer jurisdiction over him.

Bass vs. Bass, 78 N. C. 374;
Whitesides vs. Barber, 24 S. C. 373.

His appearance by attorney gives no jurisdiction.

Bailey vs. McGinniss, 57 Mo. 362;
Copeland vs. Yoakum, 38 Mo. 349.

The whole spirit of the law regarding minors and the protection given by all courts to their helplessness, as illustrated by decisions, repel the contention that an infant plaintiff could be properly held to waive, by the acts of his next friend, an important right such as that of moving to remand a cause improperly attempted to be removed into federal jurisdiction.

When a next friend or guardian has been duly appointed by the proper court, such representative of an infant may appropriately take such steps as the court sanctions, in speeding the cause and in fairly executing his trust.

Thompson vs. Land Grant Co., 168 U. S. 451.

But within the range of such duties and powers does not fall the right to make an essential appearance for the infant in another court, otherwise without jurisdiction, and thereby to waive (as is claimed) the right to trial and other proceedings in the court which appointed him.

Berier vs. Berier, 7 Phila. 618.

Thus it was further held that a guardian *ad litem* has no power to choose a tribunal to try the infant's cause, and hence cannot consent validly to submit it for decision by a referee, a master, or to arbitrators.

Jenkins vs. Freyer, 4 Paige 47;
Gamache vs. Prevost, 71 Mo. 84;
Hannum vs. Wallace, 9 Humph. 129;
Fisher vs. Stilson, 9 Abb. Pr. 33 (next friend);
Frazier vs. Pankey, 1 Swan 75.

The same principle was distinctly recognized in

O'Hara vs. MacConnell, 93 U. S. 150;
Ins. Co. vs. Bangs, 103 U. S. 435.

On this particular feature of our case, it gives us pleasure to quote the words of one of the most universally respected judges in our American annals, Mr. JUSTICE CURTIS, as follows:

> "To enable a statute guardian to bind his ward by a proceeding in a court of justice, **some statute authority must be found for his act.**"
>
> Mathewson vs. Sprague, 1 Curt 457 (16 Fed. Cas. No. 9,278).

Where, we ask respectfully, is to be found any statute authority giving a next friend, appointed by a STATE COURT, authority to enter the appearance of his infant plaintiff in a FEDERAL COURT, and thereby subject the infant to a new, original jurisdiction!!!

It is a general and universal rule that a next friend or guardian *ad litem* may not waive or admit away, any **substantial right** of the infant he represents.

Waterman vs. Lawrence, 19 Calif. 210;
Long vs. Mulford, 17 Ohio St. 484.

In the first of these decisions participated Chief Justice FIELD, afterwards a member of this court; and in the second, the counsel engaged adversely were Mr. Thurman and Mr. Matthews, both jurists of wide and high renown. In the latter case we find this statement of the scope of power of such special representatives of infants:

> "His authority is to protect; and the court will not suffer his ward to be prejudiced either by his admissions or his laches. Bingh. on Inf., 135" (p. 503).

We do not wish to be understood as being too persistent in the argument of this branch of our case, lest it be thought that we deem it of paramount importance, which we do not. In our opinion, the principal case was never properly landed in the federal harbor, because of fatal defects in the steps for removal from the state tribunal; that the objection to the jurisdiction could not be waived by any consent, and that it is therefore needless to consider the effect of any alleged waiver. If, however, your Honors should find it necessary to consider the subject of this paragraph of our brief, we believe you will find that principle and authority agree to declare that a next friend *appointed by a different court* cannot confer jurisdiction over an infant by a *mere entry of appearance* in the federal court, an appearance which was, at best, never intended or designed to have such an effect as is now claimed.

IV.

The remedy sought by mandamus is the only adequate one to restore the cause to the state court, whose jurisdiction has never been divested.

It seems needless to discuss the applicability of the

remedy now asked, if our contentions regarding the existing jurisdiction of the state court over the cause are correct. There is no adequate review by writ of error to correct a refusal to remand. It is not a final order; and where the remand is actually made, it is not reviewable by appellate process in the federal field.

Mandamus is the appropriate and only efficient remedy at the service of plaintiff where a United States trial court retains and exercises a jurisdiction not vested therein by the federal laws over a removed cause, belonging in a state court. We consider this proposition so clear and well settled by definite judgments that we refrain from further argument thereof.

Ex parte Wisner, 203 U. S. 449;
Matter of Engineering Co., 194 U. S. 458;
Ex parte Bank, 207 U. S. 61.

We crave pardon for the length of this Brief. The topics involved are interesting to us, and the seeming want of harmony in rulings thereon by some of the circuit courts have led us to submit our views on the disputed points as fully as the time at our command permits. We believe that the jurisdiction of the state court over the principal cause has not yet been divested, and we respectfully pray, on behalf of the infant plaintiff, that the alternative order for a *mandamus* be made peremptory.

GEORGE SAFFORD,
As Next Friend,

Thomas J. Fauntleroy
Shepard Barclay
Attorneys and of Counsel for Petitioner.

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Thos. J. Thatcher
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